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# Karen Young v Ng Tia Ching

B HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33A-259–12 OF 2011
HAYATUL AKMAL JC
18 DECEMBER 2017

C *Family Law — Children — Maintenance — Application to vary terms in decree nisi — Whether decree nisi could be varied — Whether there were material changes in circumstances — Whether major expenses arose — Whether child proven to be dyslexic and needed to be enrolled in international school — Whether there was in depth psychological report to prove son's alleged condition — Whether financial difficulties that arose result of self inflicted hardship — Whether qualified as special circumstances to vary decree nisi — Whether court could make order for maintenance that casts hardship on one party — Law Reform (Marriage and Divorce) Act 1976 s 96*

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The petitioner husband ('PH') and petitioner wife ('PW') were legally married and blessed with a boy ('the said child'). After 15 years of matrimony, PH and PW presented a joint divorce petition resulting in a decree nisi ('the said order') being made absolute. Subsequently, PW applied for ancillary relief under s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') seeking to amend the terms in the decree nisi ('the said order'), whereby parties had mutually agreed that custody, care and control of the child of their Marriage be given to PW while the PH was given an unlimited access to the said child and PH to pay a monthly maintenance from the date of the decree nisi. The PW was applying to vary the said order as follows: (a) an increase of maintenance for the said child from RM1,200 to RM10,000 until the said child attained 21 years of age and a further increase of RM300 a month starting from January 2018 and further escalation based on the increase in school fees and other curriculum activities of the said child; and (b) the property to be sold off for an amount of not less than RM380,000 and PH to vacate the said property a month after the signing of the sale and purchase Agreement. The issues that arose were: (i) whether the decree nisi could be varied; and (ii) whether there was a material change in the circumstances.

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I **Held**, dismissing application:

(1) The parties had mutually agreed and the said order was entered by consent. A consent order must rarely be disturbed unless there are exceptional circumstances that warranted intervention of the court and the burden is on the applicant to prove on a balance of probabilities that

the need to vary legally existed. The evidential burden laid on the applicant to satisfy the court on a balance of probabilities that there is a material change of circumstances that warrants a change before the court exercise its discretion (see para 15).

(2) It was submitted by PW that there had been a material change in the circumstances based on the fact that their growing son had greater needs in his upbringing. According to PW, major expenses arose in relation to their son's educational expenses which amounted to RM4,500 a month excluding other expenses due to their son being enrolled in an international school. It was submitted that their son was found to be dyslexic after he had performed poorly at Sekolah Jenis Kebangsaan (Cina). However, the case made out by PW did not find support with the facts presented to the court. There was no in depth psychological report to rest PW's averment that the said boy was dyslexic. It was merely the bare claim of PW with no corroborative materials to back it up. PW had failed to justify her decision to transfer the boy to such an expensive international school that was beyond the means of the parties herein (see paras 16 & 19).

(3) The financial difficulty faced by PW was one that was created by her own unilateral decision. It was the consequences of her own actions. Thus, it could not amount to a material change in circumstances that warranted the court to exercise its discretion for a change. PW had stayed in the rented apartment since before the decree nisi was granted and therefore those expenses were familiar to her and were already incurred by PW. PH had been consistent in complying with the terms of the said order where he continued paying maintenance for the boy and paying for the said property. PW had acknowledged that the outstanding loan on the said property was now small and because of that was asking for the sale of the said property to finance her and the boy, which did not qualify as special circumstance that she could rely on to vary the said decree nisi (see paras 19–21).

(4) The court could not make an order for maintenance, the end result of which, would end up causing hardship to the target party in question. To accede to the application by PW would certainly bring about hardship to PH. Ordering him to pay for something beyond his means was not within the legislative intent of the said Act. The want of the party was clearly distinguishable from the need of the said party. There was no material change in circumstances as required by law for this court to exercise judicial discretion (see para 22).

**[Bahasa Malaysia summary**

Pempetisyen suami ('PH') dan pemohon isteri ('PW') berkahwin secara sah dan dikurniakan seorang anak lelaki ('anak tersebut'). Selepas 15 tahun

berkahwin, PH dan PW mengemukakan petisyen perceraian bersama yang mengakibatkan perintah nisi ('perintah tersebut') dibuat mutlak. Selepas itu, PW memohon relief sampingan bawah s 96 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') yang bertujuan untuk meminda terma dalam perintah nisi ('perintah tersebut'), di mana pihak-pihak bersetuju penjagaan, pemeliharaan dan kawalan anak hasil perkawinan mereka diberi kepada PW manakala PH diberi akses tanpa batas kepada anak tersebut dan PH membayar nafkah bulanan dari tarikh decree nisi. PW telah memohon untuk mengubah perintah tersebut seperti berikut: (a) peningkatan nafkah bagi anak tersebut daripada RM1,200 menjadi RM10,000 sehingga kanak-kanak tersebut mencapai usia 21 tahun dan peningkatan selanjutnya sebanyak RM300 sebulan bermula dari bulan Januari 2018 dan peningkatan selanjutnya berdasarkan kenaikan yuran sekolah dan aktiviti kurikulum lain anak tersebut; dan (b) agar hartanah dijual untuk suatu jumlah tidak kurang daripada RM380,000 dan PH mengosongkan harta tersebut sebulan selepas menandatangani perjanjian jual beli. Isu yang timbul ialah: (i) sama ada decree nisi boleh diubah; dan (ii) adakah terdapat perubahan material dalam hal keadaan.

**Diputuskan**, menolak permohonan:

(1) Pihak-pihak telah bersetuju dan perintah tersebut direkodkan dengan persetujuan. Perintah persetujuan semestinya jarang diganggu kecuali terdapat keadaan luar biasa yang mewajarkan campur tangan mahkamah dan bebannya adalah pada pemohon untuk membuktikan atas kebarangkalian kebarangkalian bahawa keperluan untuk pengubahan wujud secara sah. Beban pembuktian jelas terletak pada pemohon untuk memuaskan mahkamah atas imbangan kebarangkalian bahawa terdapat perubahan material yang penting yang mewajarkan perubahan sebelum mahkamah menjalankan budi bicaranya (lihat perenggan 15).

(2) Telah dikemukakan oleh PW bahawa terdapat perubahan material dalam hal keadaan berdasarkan fakta bahawa anak mereka yang semakin membesar mempunyai keperluan yang lebih besar dalam pendidikannya. Menurut PW, perbelanjaan utama timbul berhubung dengan perbelanjaan pendidikan anak mereka yang berjumlah RM4,500 sebulan tanpa termasuk perbelanjaan lain kerana anak mereka sedang dimasukkan ke sekolah antarabangsa. Dikemukakan bahawa anak mereka didapati disleksia selepas prestasi teruknya di Sekolah Jenis Kebangsaan (Cina). Walau bagaimanapun, kes yang dihujahkan oleh PW tidak disokong dengan fakta yang dikemukakan kepada mahkamah. Tidak ada laporan psikologi yang mendalam untuk menyokong PW bahawa anak tersebut mengalami disleksia. Ia hanyalah tuntutan kosong oleh PW tanpa material yang kuat untuk menyokongnya. PW gagal menjustifikasikan keputusannya untuk memindahkan anak tersebut ke sekolah antarabangsa yang mahal yang berada di luar kemampuan

pihak-pihak dalam kes ini (lihat perenggan 16 & 19).

(3) Kesempitan kewangan yang dihadapi oleh PW adalah akibat keputusannya sendiri secara sepihak. Ia adalah akibat tindakannya sendiri. Oleh itu, ia tidak boleh berubah menjadi perubahan material dalam keadaan yang membenarkan mahkamah untuk menjalankan budi bicara untuk satu perubahan. PW telah tinggal di apartmen yang disewa sejak sebelum perintah itu dikeluarkan dan oleh itu perbelanjaan itu lazim buatnya dan sudah pun ditanggung oleh PW. PH konsisten dalam mematuhi terma perintah tersebut di mana beliau terus membayar nafkah untuk anak tersebut dan membayar nafkah tersebut. PW telah mengakui bahawa pinjaman bersama atas hartanah tersebut kini dan dengan itu memohon jualan harta tersebut untuk membiayainya dan anak tersebut, yang mana bukan keadaan istimewa yang boleh menjadi pergantungan buatnya untuk mengubah keadaan tersebut decree nisi (lihat perenggan 19–21).

(4) Mahkamah tidak boleh membuat perintah untuk nafkah, yang akhirnya akan menyebabkan kesulitan kepada pihak sasaran yang dipersoalkan. Untuk bersetuju dengan permohonan PW tentu sekali akan menyebabkan kesukaran kepada PH. Mengarahkan beliau membayar sesuatu yang melampaui kemampuannya bukan niat perundangan Akta tersebut. Keinginan pihak jelas dapat dibezakan daripada keperluan pihak tersebut. Tidak ada perubahan material dalam keadaan seperti yang dikehendaki oleh undang-undang bagi mahkamah ini menjalankan budi bicara kehakiman (lihat perenggan 22).]

**Notes**

For cases on maintenance, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3993–4016.

**Cases referred to**

*Edgar v Edgar* [1980] 3 All ER 887, CA (refd)

*Lau Hui Sing v Wong Chuo Yong (f)* [2008] 5 MLJ 846; [2008] 9 CLJ 232, HC (refd)

*Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627; [1996] 2 BLJ 356, HC (refd)

*Ng Say Chuan (h) v Lim Szu Ling (w) and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 371, HC (refd)

*Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240; [2004] 7 CLJ 175, HC (refd)

*Soon Lee Huat Palm Oil Mill Sdn Bhd v Stable-Win Sdn Bhd* [2013] 4 MLJ 374; [2013] 4 CLJ 640, CA (refd)

*Subramaniam a/l P Govindasamy v Susila a/p S Sankaran* [2017] MLJU 975; [2017] 1 LNS 863, CA (refd)

*Vadivellu a/l Kalimuthu v Rajes a/p Subramaniam* [2015] 9 MLJ 149; [2014] 1 LNS 1276, HC (refd)
*W v H* [1987] 2 MLJ 235 (refd)
*YCC @ JCC v LSY* [2006] 7 MLJ 137; [2007] 7 CLJ 207, HC (refd)
*Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408, HC (refd)

**Legislation referred to**

Law Reform (Marriage and Divorce) Act 1976 ss 96, 97

*Teoh Chye Yi (Raja, Darryl & Loh) for the petitioner wife.*
*Sukhbeer Singh (Sukhbeer & Assoc) for the petitioner husband.*

**Hayatul Akmal JC:**

INTRODUCTION

**[1]** This is an application for ancillary relief under s 96 of the Law Reform (Marriage and Divorce) Act 1976 (encl 11) filed by the petitioner wife ('PW') seeking to amend the terms in the decree nisi dated 6 January 2012 ('the said order'), whereby parties had mutually agreed that custody, care and control of the child of their marriage named Shane Ng Wen Ann be given to PW while the petitioner husband ('PH') is given an unlimited access to the said child, PH to pay maintenance of RM800 a month from the date of this decree nisi (further increase it to RM1,200 per month starting from 1 January 2013) until the said child attained the age of 21 years old and other orders. PW is now applying to vary the said order by increasing the maintenance of the said child from RM1,200 to RM10,000 until the said child attained the age of 21 and further increase of RM300 per month starting from January 2018 and other prayers.

**[2]** The relevant cause papers and written submissions, are as follows:

(a) encl 11: the application dated 25 January 2017;

(b) encl 12: the PW's affidavit in support affirmed by Karen Young on 25 January 2017;

(c) encl 15: the PH's affidavit in reply affirmed by Ng Tia Ching on 2 March 2017;

(d) encl 16: the PW's affidavit in reply affirmed by Karen Young on 4 April 2017;

(e) encl 17: the PH's affidavit in reply (2) affirmed by Ng Tia Ching on 18 April 2017;

(f) encl 19: PW's written submission;

(g) encl 23: PW's written submission in reply;

(h) encl 19: PH's written submission; and

(i) encl 28: PH's written submission in reply.

**[3]** This application was heard before me on 5 October 2017 and after perusing the cause papers filed, respective written submissions of the parties, I dismissed the said application with no order as to cost. Dissatisfied, PW had filed this appeal and my reasons are as follows:

Brief Facts

**[4]** The brief facts disclosed from the cause papers are as follows:

(a) PH and PW were legally married on 1 January 1996 and are blessed with a boy name Shane Ng Wen Ann ('the said boy') born on 13 September 2002 (15+ years). On 9 December 2011 after 15 years of matrimony, PH and PW presented a joint divorce petition resulting in the said decree nisi (exh KY1 — encl 12) being made absolute on 5 April 2012;

(b) among the terms in the said order was that the custody, care and control of the said child be given to PW, while PH be given unlimited access with 48 hours of prior notice given to PW;

(c) PH to pay maintenance of RM800 a month from the date of the decree nisi (further increase to RM1,200 per month starting from 1 January 2013) until the said child attained the age of 21 years old; and

(d) PH will continue staying at A-3–4 Desa Gembira Condominium, 6 Jalan 1/127A, Off Kuchai Lama, Kuala Lumpur ('the said property') and will bear the bank instalments and expenses of the said property and will indemnify PW of any claim made on the said property.

**[5]** PW is now applying to vary the said order, as follows:

(a) an increase of maintenance for the said child from RM1,200 to RM10,000 (approximately 835% increase) until the said child attained 21 years of age and a further increase of RM300 per month starting from January 2018 and further escalation based on the increase in school fees and other curriculum activities of the said child; and

(b) the said property to be sold off for an amount of not less than RM380,000 and PH to vacate the said property a month after the signing of the sale purchase agreement. The proceeds from the sale of the said property is to be used to pay all outstanding loans/fees/charges on that said property and any balance is to be kept for the education of the said child.

ISSUES TO BE TRIED

(a) Whether the decree nisi can be varied; and

(b) whether there is a material change in the circumstances.

SUBMISSION BY THE PETITIONER WIFE ('PW')

**[6]** During the divorce in 2012, the said boy who was ten years old and at that time was attending Sekolah Jenis Kebangsaan (Cina) Thai Thung at Salak South, Kuala Lumpur. The said boy is dyslexic and encountered severe learning disabilities in reading and comprehending and expanding his Chinese vocabulary and performed poorly at school. In 2013, PW enrolled the said boy in an international school, the Asia Pacific School in Subang, Selangor and according to PW, the said boy allegedly has performed better.

**[7]** PW argued that all these years, PH has never questioned about the said boy attending international school nor contributed to paying for his education. In a month, PW spends RM4,500 for the said education, RM2,600 on other expenses, RM250 to RM500 on general expenses unconnected to school and RM2,000 on rental and other expenses.

**[8]** There is now a material change in circumstances where the said boy has grown from being a child to a teenager with greater needs both in school and in his upbringing and PW should not be the sole person to bear the said boy's educational expenses and other needs. PW's rational to transfer the said boy to an international school is because it offers a better learning environment and adequate attention paramount to the said boy's condition which has never been opposed to by PH. PW further argued that she is entitled to the relief sought comprising additional maintenance payments for the said boy and also for PH to vacate the said property which should be sold and the proceeds divided up between PH and PW in order that they both have some cash to make payment towards their own property. The said property should be sold as the loan outstanding is now relatively small and there will be a surplus to enable PH and PW to buy a property of their own as well as some monies to be set aside for the said boy. PW also argued that proposal for the sale of the said property is fair for her and the said boy's benefit.

**[9]** PW however, acknowledged that PH was once subjected to severe financial problems and needed help to settle his debts under the AKPK Debt Management Programme, but he can no longer complain of such financial constraints. PW pointed out that PH has made no attempt to disclose his financial position including the balance tenure for his repayment under the AKPK Debt Management Programme and his various ongoing liabilities. He appears to be able to afford a handphone, broadband and Astro and that would

indicate that PH's financial circumstances have changed and he must bear his responsibilities to support the said boy and should not be allowed to enjoy the said property which should be sold and the proceeds divided as proposed by PW.

SUBMISSION BY THE PETITIONER HUSBAND ('PH')

**[10]** PH objected to the application to vary the said decree nisi as contained in his affidavit affirmed on 2 March 2017 and 18 April 2017, respectively. PH had informed PW that he can't afford to increase the maintenance for the said boy. He listed out his monthly expenses which amounts to RM9,788.96 out of which he also gives his mother a sum of RM1,000 monthly as financial support. His net salary is RM9,809 (after deduction for EPF, Perkeso and income tax). Since PH has only RM1,600 left for himself, he therefore argued that he can't afford to pay the maintenance asked for by PW as well as the increase of RM300 yearly, as prayed for by PW. To this he enclosed his salary slip for corroboration (exh NTC1 — encl 15).

**[11]** It was further argued by PH that PW had made a unilateral decision without due consultation and consent of PH to transfer the said boy to an international school and submitted that that act has brought about an unnecessary and unwarranted change (perubahan yang tidak diperlukan). PH submitted that the said boy is not dyslexic and even if he is then he has to be enrolled into a special school for children with dyslexia and not an international school. PH pointed out that the claim by PW that the said boy is dyslexic is not supported by any medical report. He also argued that during the early years the said boy was enrolled at the Sekolah Jenis Kebangsaan (Cina) Thai Thung at Salak South, Kuala Lumpur and if it is true that the said boy performed poorly, then he should be sent to tuition class and not sent to an international school which is beyond the means of PH and PW. Such a unilateral decision was irrational and unreasonable. Consequently therefore, it is the submitted case of PH that the alleged change in the circumstance as prayed for by PW tantamount to a self-induced change and not a change that occurred naturally by circumstances.

**[12]** It was argued that PW is earning RM11,000 a month and parties had already separated before the decree nisi was granted. Therefore all her expenses were familiar to her. PH had complied with the terms in the said order and has been paying towards the said property. There is no necessity for the requested disposal of the said property at the moment. PH has no other property except his half share in the said property. Any financial hardship faced by PW is due to her own doing and spending beyond her means. There is no material change in circumstances as such.

A THE LAW

**[13]** The Law Reform (Marriage and Divorce) Act 1976 provides instances where the orders from the court can be varied, as follows:

B (a) s 96 provides as follows:

> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

C

(b) s 97 provides as follows:

> The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

D

E In a nutshell, the legal position above could be summarised as follows:

(a) as a general rule, a consent order cannot be set aside, varied or discharged (see *Vadivellu a/l Kalimuthu v Rajes a/p Subramaniam* [2015] 9 MLJ 149; [2014] 1 LNS 1276);

F (b) notwithstanding the statutory exceptions to this general rule in matrimonial matters, the court is under a duty to ensure that the issues are not re-litigated again (see *Lau Hui Sing v Wong Chuo Yong (f)* [2008] 5 MLJ 846; [2008] 9 CLJ 232);

G Section 96:

(a) the court has the power to vary, rescind orders for maintenance and custody on grounds of misrepresentation, mistake of fact or material changes in circumstances:

H (i) misrepresentation can either be innocent which entitle to rescission, or fraudulent which allows for repudiation (see *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627; [1996] 2 BLJ 356);

I (ii) mistake of fact is the unconscious ignorance or forgetfulness as to facts material to the contract or into believing in the existence of a thing material to the contract which do not exist while mistake of law is in coming to an erroneous conclusion as to the effects of the law from a series of known facts (see Court of Appeal's decision in *Soon Lee Huat Palm Oil Mill Sdn Bhd v Stable-Win Sdn Bhd* [2013]

4 MLJ 374; [2013] 4 CLJ 640); and

(iii) material changes as to the circumstances is a situation where the existence of or the occurrences of changes that can be deemed to be legally sufficient to invite the court's discretion to address those changes subject always to the facts and circumstances of each case.

Section 97:

(a) notwithstanding any agreement to the contrary, the court has the power to vary the terms of any agreement relating to custody and maintenance of a child;

(b) no interests of a child are to be compromised in any documents drawn up by adults (see *W v H* [1987] 2 MLJ 235);

(c) in *Edgar v Edgar* [1980] 3 All ER 887, Ormrod LJ said:

> To decide what weight should be given, in order to reach a just result, to a prior agreement ... regard must be had to the conduct of both parties leading up to the prior agreement, to their subsequent conduct in consequence of it ... formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of the agreement.

(d) The benefit and welfare of the child will be the paramount consideration.

FINDINGS OF THIS COURT

*Whether the decree nisi can be varied*

**[14]** In *Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408, where it was held:

> [1] that there was no question of either party being estopped from varying an order made by consent, if the application to vary was made under either s 83 or 96 of the Law Reform (Marriage & Divorce) Act 1976, as the law gives the court the power to vary such orders in the circumstances set out in those sections, and the power is not limited to non-consensual.

It is clear that an order can be varied at any time by the court based on any circumstances as set out in the sections mentioned above.

**[15]** However in the present case, parties had mutually agreed and the said order was entered by consent, case law has established the legal position that a consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the burden is on the applicant to prove on balance of probabilities that the need to vary legally existed. In the case of *Ng Say Chuan (h) v Lim Szu Ling (w) and another*

*application* [2010] 4 MLJ 796; [2010] 10 CLJ 371 where Yeoh Wee Siam J held that:

> [1] A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Under s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any material change in the circumstances.

In *Subramaniam a/l P Govindasamy v Susila a/p S Sankaran* [2017] MLJU 975; [2017] 1 LNS 863 where Hamid Sultan JCA in delivering the decision of the Court of Appeal said:

> [11] On the issue of amending a consent order or terms, the court will not readily entertain the application. However, to say that the court has no powers to amend the consent order or terms on the grounds of solicitor's mistake may not be totally correct. It all depends on the facts and justice of the case.

In *YCC @ JCC v LSY* [2006] 7 MLJ 137; [2007] 7 CLJ 207, Clement Skinner J confirmed that the evidential burden lies on the applicant to satisfy the court on a balance of probabilities, that there is a material change of circumstances that warrants a change before the court will exercise its discretion.

*Whether there is a material change in circumstances*

**[16]** In the present application, PW submitted that there has been a material change in the circumstances based on the fact that the said boy has grown from being a child to a teenager with greater needs both in school and in his upbringing and PW should not be the sole person to bear the said boy's educational expenses and other needs. However, looking at the evidence presented before the court, it is my considered view that the case made out by PW on the existence of material change in circumstances that necessitate a change does not find support with the facts presented to the court. From her submission, I find the major expenses are related to the said boy's educational expenses which amounts to RM4,500 a month excluding his other expenses. To an average working parents this represent a very high figure for one to bear for the education of a 15 year old boy, unless it is with the means of the said parents. The reasoning given for the enrolment into an international school is due to the alleged dyslexic condition that the said boy suffers and after he performed poorly at Sekolah Jenis Kebangsaan (Cina) Thai Thung at Salak South, Kuala Lumpur, where he was earlier enrolled into.

**[17]** As a Pengurus Pemasaran Serantau, PW is presently earning RM11,000 monthly and she had listed down the breakdown of her monthly expenses which for ease of reference, I have tabulated as follows:

| No | RM | Proposal by the PW |
|---|---|---|
| 1 | 2,917 | School fees |
| 2 | 504 | School transport |
| 3 | 300 | School uniform (yearly) |
| 4 | 180 | Food for the said boy |
| 5 | 150 | Books for the said boy |
| 6 | 720 | Mathematic tuition |
| 7 | 160 | Kumon |
| 8 | 280 | Chinese language |
| 9 | 960 | Science tuition |
| 10 | 250–500 | Other activities (said boy) |
| 11 | 1,550 | Filtered |
| 12 | 580 | Utilities |
| | Total | 8,801 |
| | Balance | 2,199 |

**[18]** PH on the other hand works at Amtrustee Bhd and earns RM12,476 monthly. After deduction for EPF, Perkeso and income tax), (exh NTC1 (salary slip) — encl 15) he received RM9,809. He had listed down the breakdown of his monthly expenses which for ease of reference, I have tabulated as follows:

| No | RM | Expenses by the PH |
|---|---|---|
| 1 | 976.96 | The said property monthly repayment |
| 2 | 1,412 | Car loan |
| 3 | 2,580 | AKPK Debt Management Programme |
| 4 | 230 | Maintenance for the said property |
| 5 | 810 | Electricity bill, broadband for handphone and Astro |
| 6 | 1,200 | Maintenance (decree nisi) |
| 7 | 100 | DBKL every six months |
| 8 | 1,000 | Given to his mother |
| | Total | 8,308.96 |
| | Balance | 1,500 |

From the two above tabulations, it is clear as to how much balance both parties has left from their income for their monthly sustenance. PH had exhibited his salary slip exh NCT1 for August 2016 (not the latest) but PW on the other hand has not enclosed any salary slip to support her averment of receiving RM11,000 a month.

**[19]** I find that there is no indepth psychological report to rest PW's averment that the said boy is a dyslexic. Dyslexia is a common learning

difficulty that can cause problems with reading, writing and spelling. It is a specific learning difficulty, which means it causes problem with certain abilities used for learning (see *Dorland's Medical Dictionary* (32nd Ed)). Unlike a learning disability, intelligence isn't affected. An indepth assessment from specialist dyslexia teacher or an educational psychologist is required. It cannot be based on hunches or feelings of the parent concerned. In the present case, no such indepth assessment can be found. If a child is dyslexic, the first thing to do is to diagnose the condition for confirmation where experts would then set the sort of technics or support that is required to treat such a condition. If such a condition is confirmed, one cannot simply treat such a condition by merely deciding to send the affected child to an international school as claimed although there is no reason that a dyslexic child can't go to a mainstream school. Nevertheless, we still need the indepth psychological assessment for evaluation of the claim by PW. In the present case, it was merely the bare claim of PW with no corroborative materials to back it up. In the circumstances, I find that PW has failed to justify her decision to transfer the said boy to such an expensive international school which on the facts of case, would indicate that it is beyond the means of the parties herein in particular PH or else this present application would not be before the court today. One cannot make a general assumption that government schools had caused the said boy to perform poorly. In most cases, it has nothing to do with the school but the child itself. If indeed the said boy had performed poorly, as alleged at the government school, then efforts should be taken to improve his performance by having a tutor or extra classes to tend to his needs. No doubt it is within the discretion of the parent as to where to enrol the said boy for his schooling but such decision must be made on the basis of the financial ability of the said parent. Everybody wants the best for their child but the said want must be addressed on the ability and the means of the parent. Going beyond the means and ability will attract unnecessary hardship which cannot be faulted to another. In such a case, it is regarded as a self-inflicted injury/hardship. In the present case, dyslexic condition cannot be made the ground for such a decision as firstly there is no confirmation of diagnosis and secondly that is not the treatment for such a condition. I have perused the said boy's academic progress as enclosed in the exh KY5 (encl 16), I find the said boy is not doing that well either (presently). Therefore, the argument by PW that the said boy has improved is not supported by the documents adduced. Particular attention is to be paid to the fact that notwithstanding enrolling the said boy in such an expensive international school, the said boy still has to attend extra classes and tuition for maths, science and languages classes. It do not show glaring differences in improvement with his performance at the government school then. Consequently, the financial difficulty faced by PW is one that is created by her own unilateral decision. It is the consequences of her own action as regards to the said boy. In the premise, I am of the considered view that it cannot amount to a material change in circumstances that warrants the court to exercise its discretion for a change.

**[20]** Regarding her expenses at the rented property, I refer to the tenancy agreement (dated 28 June 2011), entered into by PW (refer exh KY4 (encl 12)) and as correctly stated by PH, PW had stayed in that rented apartment since 2011 before the decree nisi was granted, and therefore as submitted by PH, those expenses are familiar to her and were already incurred by PW before the decree nisi was granted.

**[21]** PH has been very consistent in complying with the terms of the said order where he continued paying maintenance for the said boy and paying for the said property. PW had acknowledged that the outstanding loan on the said property is now small, and because of that is asking for the sale of the said property to finance her and the said boy, which to my mind does not qualify as special circumstance that she can rely to vary the said decree nisi. PH in his affidavit avers that he has not breached the terms as agreed by parties in the said decree nisi. I agree that the financial predicament faced by the PW presently is self-induced since there is no necessity to incur unnecessary high cost by transferring the said boy to an international school considering the financial position of the parties.

**[22]** It is trite that the assessment of maintenance is based primarily on the means and the needs of the parties. The need of the party seeking maintenance is the crucial factor for providing maintenance. In deciding the quantum of maintenance, the capacity of the husband, his ability to pay and the realities of the parties financial position should be taken into account. The potential earning of the applicant for maintenance should also be considered (see *Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240; [2004] 7 CLJ 175). The court cannot make an order for maintenance, the end result of which, would end up causing hardship to the target party in question. Looking at the parties balance of monthly income as tabulated above, to accede to this application by PW would certainly bring about hardship to PH. Ordering him to pay for something beyond his means is not within the legislative intent of the said Act. The want of a party is clearly distinguishable from the need of the said party. Based on my observation from the presentation of their respective arguments before me, I find the balance tilted in the favour of PH and there is no material change in circumstances as required by law for me to exercise my judicial discretion.

CONCLUSION

**[23]** In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I dismissed the PW's application (L11) with no order as to cost.

*Application dismissed.*

Reported by Afiq Mohamad Noor